

# EMPLOYMENT LAW ALERT

April 2010

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## Considering Using Summer Interns? Then Consider Paying Them

By: Jeffrey M. Schlossberg and Kimberly B. Malerba

Given today's uncertain economic climate, it has been increasingly difficult for the many unemployed or underemployed to find jobs. Among those looking for work are students and others who are seeking not only to earn a paycheck, but also more importantly for some, to gain experience. With such a tight job market and the ever-increasing number of college students, graduates and laid-off workers, many are willing to forego a paycheck to gain experience in an industry that they are trying to break into - with the hopes that this will give them a competitive edge and a better resume, or that it will later turn into a paying job. These eager individuals who can (or at least are willing to) sacrifice a paycheck, have led to a swell in the number of employers who are engaging unpaid "interns."

While hiring unpaid interns may sound like a great idea for employers - free labor by an enthusiastic and willing participant - extreme caution must be exercised. Both the federal and New York State Departments of Labor are cracking down on companies that fail to properly compensate interns. There are only certain limited circumstances in which hiring unpaid interns is acceptable.

The United States Department of Labor has developed a six-factor test for determining whether an individual can be an unpaid intern as opposed to an "employee." The latter is required to be paid minimum wage and overtime. The criteria for an unpaid intern are:

1. The training, even though it includes actual operations of the facilities of the employer, is similar to that which would be given in a vocational school or academic educational instruction.
2. The training is for the benefit of the student.
3. The student does not displace regular employees, but

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- works under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the student; and, on occasion, the employer's operations may actually be impeded.
  5. The student is not necessarily entitled to a job at the conclusion of the training period.
  6. The employer and the student understand that the student is not entitled to wages for the time spent during training.

Not all of the factors necessarily need to be present for a student to be a lawful unpaid intern. The central focus should be on whether the student is the primary beneficiary of the arrangement. If the company is considered the primary beneficiary it is likely the student will be an "employee" and covered by the wage and hour laws. Here are some tips employers should consider if the goal is to conduct an unpaid internship:

1. Focus on exposing the intern to a career field and offer a mentoring experience. The focus should not be on producing goods or delivering services.
2. Ensure that interns are not substituting for regular workers. Rather, interns should be provided with job shadowing opportunities to learn functions and operations under close supervision and should perform minimal work.
3. Request documentation from the educational institution that confirms the internship is approved as educationally relevant and that the student will be entitled to receive credit for the internship.
4. Confirm in writing the intern's understanding that the internship is unpaid.

With the summer approaching fast, and the onslaught of college students about to return home looking for summer positions, employers must be cognizant of the serious implications that can arise in the event of a complaint or an audit from the Department of Labor. In addition to the potential for exposure resulting from a violation of the minimum wage and overtime laws, there may also be implications concerning discrimination laws, tax issues, workers' compensation coverage, employee benefits and unemployment insurance. Therefore, when considering an internship program, employers should keep in mind that while an internship can be an excellent experience for both the employer and the intern, a violation of the wage and hour laws brings significant financial exposure. However, if structured properly with some advance planning, an internship can be rewarding for all and legally sound.

## **IRS Publishes New HIRE Act Affidavit**

The Internal Revenue Service has developed an affidavit for use by employers to confirm that an employee is a qualified employee under the Hiring Incentives to Restore Employment (HIRE) Act. The new law entitles an employer to a payroll tax exemption or a new hire retention credit, provided the new employee completes the affidavit. A copy of the affidavit can be obtained

from the IRS website: [Form W-11](#)

## **COBRA Subsidy Extended Through May 31, 2010**

On April 15, 2010, President Obama signed into law an extension of the COBRA benefits premium assistance provision of the American Recovery and Reinvestment Act of 2009 through May 31, 2010. Therefore, employees who are involuntarily terminated on or before May 31, 2010 may be eligible for the subsidy.

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.



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